STATE OF WISCONSIN
BEFORE THE GOVERNMENT ACCOUNTABILTY BOARD

IN RE PETITION TO RECALL SENATOR TERRY MOULTON OF THE 23rd SENATE DISTRICT;	WGAB ID#0600019
SENATOR PAM GALLOWAY OF THE 29th SENATE DISTRICT;	WGAB ID#0600020
SENATOR VAN WANGGAARD OF THE 21st DISTRICT; AND	WGAB ID#0600021
SENATOR SCOTT FITZGERALD OF THE 13th SENATE DISTRICT.	WGAB ID #0600024

RECALL COMMITTEES' BRIEF IN OPPOSITION TO WRITTEN CHALLENGES

The above-specified recall committees, by their attorney Jeremy P. Levinson, submit this memorandum in response to the challenges to recall petitions and signatures submitted by Senators Moulton, Galloway, Wanggaard and Fitzgerald.

INTRODUCTION

The challenges do not, and cannot, call the validity of the recall effort into question. Each recall effort boasts thousands of valid signatures more than required to trigger recall elections. The challenges are overwhelmingly baseless for the following reasons:

- The bulk of the challenges rest on frivolous legal assertions that the GAB has already reviewed and rejected. The challenges contend that the recall efforts should be tied to the legislative districts that Wisconsin 2011 Act 43 may make effective as of the 2012 general election in November, rather than the districts that currently exist. The GAB correctly rejected this argument as contradicting the text of Act 43 and the recall committees and hundreds of thousands of Wisconsin electors were right to rely on the GAB's determination. The recalls appropriately proceeded in the existing districts – the ones from which the senators were elected.

- The challenges also take issue with the time-period for circulating petitions, as was already correctly determined by the GAB. As with the "districts" issue, and despite the challengers' efforts to sow confusion, this is not very complicated. All four recall committees filed on November 15, 2011 and signatures dated between that date and January 14, 2012 are valid.

- The challenges are rife with false assertions about identified petition pages and signatures, *i.e.*, the data on which their analyses are based does not reflect the content of the actual signature or petition page. The staggering number of these false assertions not only renders the specific challenges meritless, it strains credulity, and calls the quality and integrity of the challenges as a whole into question.

- The challenges often rest on misstatements about the legal standards for striking signatures. The challenges ask the GAB to discount electors merely because of, *e.g.*, a misspelled word, a voter not being currently registered to vote at their residence, or allegations that a signature is ineligible with no proof provided. These challenges fail to state a legal basis for invalidating a signature.

- The challenges also include several generalized assertions of fact that were "widely reported" or that otherwise have no factual support. This rhetoric does not begin to meet the challengers' burden.

- Finally, the challenges turn the process on its head, contemplating review as an all-out effort to negate electors' signatures based on the shoddiest of analysis, the most superficial quirk, *i.e.*, a misspelled word, or failed and rehashed misstatements of law that do not and cannot change the fact that thousands of electors more than the threshold for triggering recall elections signed the petitions. The challenges ignore the fact that where petitions are certified by circulators they are presumed to be valid. The burden of overcoming this presumption by clear and convincing evidence is part of a fundamental and long-established review framework that is focused on giving effect to the will of the electors more than it is concerned with fortunes of an incumbent official.

Despite the challenges' sloppiness, dishonesty, and attempts to create uncalled for complexity and confusion, the challenges fail for simple, concrete, and specific reasons.

DISCUSSION

I. THE CHALLENGES IGNORE WELL-ESTABLISHED PRINCIPLES OF ELECTION LAW AND PETITION REVIEW

This process is intended to implement and safeguard the will of the electors. It is not a weapon for helping incumbent senators hide from the many thousands of their constituents who demand recall elections.

The Wisconsin Constitution, Article XIII, § 12, establishes the rights of qualified electors to petition for the recall of incumbent elected officials such as Senators Moulton, Galloway, Wanggaard and Fitzgerald. Article XIII, § 12, sub. (7), provides:

> This section shall be self–executing and mandatory. Laws may be enacted to facilitate its operation but no law shall be enacted to hamper, restrict or impair the right of recall.

Accordingly, the policy of both the GAB and its predecessor agency has been to facilitate the will of the electorate with respect to the petition at hand, not to find a justification for impeding the will of the electorate as expressed in a particular petition. The statutory standard for compliance is "substantial compliance":

> CONSTRUCTION OF CHS. 5 TO 12. Except as otherwise provided, chs.5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to comply with some of their provisions.

§ 5.01(1), Wis. Stats.

"The object of election laws is to secure the rights of duly qualified electors and not to defeat them." *Stahovic v. Rajchel*, 122 Wis. 2d 370, 376, 363 N.W.2d 243 (Ct. App. 1984). A review of Wisconsin case law demonstrates that substantial, and not literal, compliance with election laws has been deemed consistent with § 5.01(1), Wis. Stats., and the appellate courts have consistently construed the provisions of election statutes as directory, rather than mandatory, so as to preserve the will of the elector. *Stahovic*, 122 Wis. 2d at 377.

"Generally, statutory provisions relating to recall are liberally interpreted in favor of the electorate." *Stahovic*, 122 Wis. 2d at 374; *see also Beckstrom v. Kornsi*, 63 Wis.2d 375, 388, 217 N.W.2d 283 (1974); *In re Redner v. Berning*, 153 Wis. 2d 383, 388, 450 N.W.2d 808 (Ct. App. 1989); *Carlson v. Jones*, 147 Wis. 2d 630, 636, 433 N.W.2d 635 (Ct. App. 1988); *In re Haase v. Angove*, 120 Wis. 2d 40, 46, 353 N.W.2d 821 (Ct. App. 1984). The statutory requirements for preparation, signing, and execution of petitions for recall are directory rather than mandatory. *In re Redner*, 153 Wis. 2d at 390; *see also Jensen v. Miesbauer*, 121 Wis. 2d

467, 469, 360 N.W.2d 535 (Ct. App. 1984). Only substantial compliance with the recall procedure is necessary and that merely requires the petitions to be circulated in a manner that protects against fraud and assures the signers knew the contents of the petitions. *In re Redner*, 153 Wis. 2d at 390-91; *see also In re Haase*, 120 Wis. 2d at 46.

GAB § 2.05(4), Wis. Adm. Code, provides that "[a]ny information on a nomination paper is entitled to a presumption of validity." Pursuant to GAB § 2.09(1) and (5), Wis. Adm. Code, this presumption of validity is extended to the treatment and sufficiency of election petitions, including recall petitions. Consequently, any challenge to any information on the recall petition must provide clear and convincing evidence. *See also* GAB §§ 2.07(4) and 2.11(1), Wis. Adm. Code. In Wisconsin, this middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases, but a lesser degree than that required to convict in a criminal case. *Kruse v. Horlamus Industires, Inc.,* 130 Wis. 2d 357, 363, 387 N.W.2d 64 (1986). "Any challenge to the validity of signatures on the petition shall be presented by affidavit or other supporting evidence demonstrating a failure to comply with the statutory requirements." § 9.10(2)(h), Wis. Stats.[1]

The tenor of the challenges contradicts the foregoing principles. Often the "challenges" amount to nothing more than a demand that the petitions prove an apparently valid signature to be so. Likewise, the challenges offer more unsupported assertions akin to "it has been reported" than "evidence," clear and convincing or otherwise. Finally, the challenges rest in large part on disingenuous and previously rejected pronouncements of law that unsuccessfully attempt to complicate and change the straightforward and well-established meaning of two statutes. In other words, the challenges are overwhelmingly of exactly the type from which the standards of

[1] The foregoing discussion of basic principles draws on the analyses set forth by the GAB staff in analyzing challenges to recall petitions that led to recall elections during the Summer of 2011.

the review process seek to protect the electorate. They seek to undermine and obstruct rather than protect and facilitate the electoral process.

II. GAB WAS CORRECT IN DETERMINING THAT THE DISTRICTS THAT ACT 43 MAY IMPLEMENT IN THE FUTURE HAVE NO APPLICATION TO THESE RECALLS

The vast bulk of the incumbent Senators' challenges are *not* premised on the contention that specified signatures represent something other than the signatures of Wisconsin electors who demand recall elections. Rather, the main challenge the Senators raise rests on the contention that senate districts established by Wisconsin 2011 Act 43 are already in effect. So, despite the fact that the specific petitioners were the incumbent Senators' constituents since the Senators were elected, the Senators want those signatures excluded.

The Senators' assertion that the recall petitions were circulated in districts that had ceased to exist is frivolous. The text of Act 43 could not be more straightforward:

> **SECTION 10. Initial applicability.**
>
> (1) This act first applies, with respect to regular elections, to offices filled at the 2012 general election.
>
> (2) This act first applies, with respect to special or recall elections, to offices filled or contested concurrently with the 2012 general election.

(emphasis supplied).

This is the beginning and end of the analysis. Act 43 has no application here because the recall elections at issue will occur before "the 2012 general election." The GAB was correct in determining that the issue is just this simple and clear:

> The language of 2011 Wisconsin Act 43 is very clear as to the initial applicability exceptions from the Wisconsin Stats. s. 991.11 effective date of the Act (August 24, 2011). The Act initially applies for the purposes of regular elections to offices filled at the 2012 general election and to special or recall elections to offices

> filled or contested concurrently with the 2012 general election. Therefore, for purposes of any elections in 2012, the new legislative districts found in Act 43 do not apply to special or recall elections to offices filled or contested prior to the November 6, 2012 general election.[2]

Beyond being flatly wrong in an entirely uncomplicated way, the challengers' argument on this point is dishonest. Their extravagant assertions ignore the foregoing and instead distort and mischaracterize the GAB's analysis on a totally different issue. The GAB had been asked whether an incumbent could properly use tax dollars to fund communications with people who may become the incumbent's constituents in November 2012, when the Act 43 districts may be implemented. The answer to this question was "yes." So the challengers simply ignore the GAB's determination on the issue they now raise and mischaracterize the GAB's analysis of a totally different issue. In all candor, this can only be called dishonest.

Also galling, the Republican members of the Wisconsin Senate attempted to amend Act 43's effective date language to garner the result demanded in the challenges – and the legislative proposal failed.[3] The challenges ask GAB to ignore its own recent determination on this issue and the legislature's two separate determinations that the Act 43 districts should become effective concurrent with the general election in November 2012. It also worth noting that each of the incumbent Senators challenging the recall petitions voted in favor of Act 43's effective date, the statutory text they now attack.

The GAB has already resolved this point against the Senators. The GAB was correct in its announced decision. And, the recall committees and over a hundred thousand electors were

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[2] This is excerpted from the GAB staff's analysis presented to the GAB at its November 2011 meeting at which the GAB adopted the analysis as its own determination. *See Open Meeting Materials for November 2011 Meeting* at 75.

[3] On October 31, 2011, Republican State Senator Mary Lazich introduced a bill providing that Act 43 would first apply "with respect to special and recall elections for the office of senator held on or after November 9, 2011." The bill also provides that Act 43 first applies, with respect to petitions for the recall of senators, "to petitions filed on or after November 9, 2011." 2011 Senate Bill 268 available at https://docs.legis.wisconsin.gov/2011/proposals/sb268. This proposed legislation lacked requisite support and failed to make it out of Committee. *Id.*

right to rely on the GAB's determination. The "Act 43" argument, the basis for most of the challenges, is devoid of merit.

III. THE CHALLENGERS' ATTACK ON SIGNATURES BEARING THE SAME DATE AS THE COMMITTEES' REGISTRATIONS MOCKS THE VOTERS AND CONTRADICTS GAB'S CORRECT DETERMINATION OF A SIMPLE POINT OF LAW

The challengers correctly note that all four recall committee registrations occurred on November 15, 2011. Presumably because the GAB typically does not operate 24 hours a day, those registrations bear time-stamps reflecting that they were processed early that workday. The challengers then assert that "it has been widely reported" that pajama parties were had in the early, pre-business hours of November 15 at which petitions were signed. The challengers demand that whole swaths of signatures be stricken because they speculate that some may have been on November 15 prior to when the GAB was able to process the recall committees' registration forms.

The challengers (1) flatly contradict the controlling statute; (2) offer zero evidence; (3) fail to identify a single genuinely out-of-time signature; (4) improperly try to shift the burden to the GAB and the petitioners; and (5) seek a remedy – the wholesale exclusion of valid signatures – on a hunch that among them may be a sprinkling of problematic ones, which is flatly prohibited by *Stahovic*, 122 Wis. at 376 (only individual signatures proven to be invalid may be stricken).

Among the people of earth, it was found necessary to divide time into discernible units, *e.g.*, years, months, weeks, days, hours, minutes, seconds, and so forth. This permits communication about defined amounts of time in all manner of affairs including the establishment of statutory deadlines and time periods in which acts may or must be done. In this

regard, the statutes most typically deal in the units of time commonly known as "days."[4] It would seem that statutory periods cast in "hours," "minutes," or "seconds" would likely be unworkable and too administratively resource-intensive to apply.

While the challengers want to compute the circulation period in units of hours, § 9.10, Wis. Stats., uses days to define this period. As the GAB's letter to the recall committees correctly indicates, November 15, 2011 was the first day of the 60-day period and January 14, 2012 was the last. Any signatures bearing these dates, or any date between them, were appropriately obtained during the circulation period.

Section 9.10(2)(e), Wis. Stats., could not be clearer:

> An individual signature on a petition sheet may not be counted if:
>
> . . .
>
> 2. The signature is **dated** outside the circulation period.

(emphasis supplied).

The circulation period is based on days. To strike a signature as out-of-time, it must be shown, by clear and convincing evidence, that the signature was obtained outside of the circulation period or the signature must bear a date outside of that period. "In the wee hours of November 15" is not a different "date" than November 15.

Apart from its mischaracterization of law, this aspect of the challenges fails to identify any particular signature it seeks to have stricken; it is unsupported by any evidence, clear and convincing, or otherwise; and it offends established law in two additional respects. First, it shrugs off the challengers' burden by demanding the exclusion of all signatures dated November 15 on the very basis that challengers cannot discern whether any particular signatures were obtained in the early morning hours of that day. Second, in light of the challengers' inability to

[4] Of course, there are exceptions. For example, statutes of limitation often deal in units of time known as "years."

identify signatures that would actually violate their off-base concept of the statute, they demand that all signatures dated November 15 be stricken, dooming signatures that even the challengers' fanciful re-write of the law would deem totally valid. Erring in favor of understatement and ignoring all other missing predicates, this would violate the rule of *Stahovic*.

Otherwise valid signatures dated November 15, 2011 or January 14, 2012, or any day in between, are valid.

IV. THE MAJORITY OF THE REMAINING CHALLENGES ARE FACTUALLY INACCURATE, UNSUPPORTED BY EVIDENCE, AND/OR LACK ANY BASIS IN LAW

The fact that the challengers' "Act 43 districts" and "circulation period" arguments are meritless renders these challenges incapable of blocking the recall elections. *See* Exhibits A of Affidavit of Mike Pfohl In Support of Committee to Recall Fitzgerald, Affidavit of Mike Pfohl In Support of Committee to Recall Galloway, Affidavit of Mike Pfohl In Support of Committee to Recall Moulton, Affidavit of Mike Pfohl In Support of Committee to Recall Wanggaard, (collectively, "Pfohl Affidavits"). Even if this were not the case, the balance of the challenges fail because they rest on factual misstatements about the petitions; they lack supporting evidence, and/or they misapply the law in an attempt to undermine petition-signers' constitutional rights to seek recall elections.

In many instances, merely looking at specific petition pages shows that the challengers' assertions that information is missing or invalid are simply false. *See Pfohl Affidavits* at ¶ 6 and Exs. A, C. In others, the challengers make bare assertions about signers not being old enough, not having signed the petition, or not having provided a valid residential address – but offer no evidence to support the assertions. *Id.* at Ex. C. Finally, the challengers make a number of challenges that clearly have no basis in the law. The challenges premised on a circulator not

being a Wisconsin resident or a signer not currently registered to vote at their address lack any legal basis and should be disregarded. *See Id.*

CONCLUSION

For the foregoing reasons, the recall committees respectfully request that the GAB certify the petitions to recall Senators Moulton, Galloway, Wanggaard and Fitzgerald

Dated this 13th day of February, 2012.

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By: _____

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